Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	CC Docket No. 95-116
Telephone Number Portability	)	RM 8535
	)	

REPLY COMMENTS OF DAVID L. KAHN

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Dated: October 11, 1995

I.

THE FCC IN ORDERING 800 NUMBER PORTABILITY CONCLUDED THAT UNTIL 800 NUMBER PORTABILITY WAS AVAILABLE, FUTURE BUNDLING BY AT&T OF ANY SERVICE USING OLD "800 NUMBERS" WAS AN UNLAWFUL PRACTICE UNDER SECTION 201(b) OF THE COMMUNICATIONS ACT.

In In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, the FCC stated:

> "We conclude, first, that until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using "old" 800 numbers (800 numbers that were in use by the customer on the day prior to the release of this order) is an unlawful practice under section 201(b) of the Communications Act." FCC Rcd. No. 9, p.2677

The FCC's rationale was that:

> "Because of concerns that bundling of 800 services by AT&T could lead to anticompetitive leveraging, thereby harming competition for other services, we prohibited AT&T from including 800 or inbound services in contract-based tariffs or Tariff 12 integrated services packages until 800 numbers become portable." 7 FCC Rcd. No. 9, p. 2678.

More specifically, the FCC concluded:

> "We have found that leveraging is a significant risk with respect to "captive" 800 service customers -- customers that are unable to change their 800 number without incurring substantial costs." 7 FCC Rcd. No. 9, p.2680.

The FCC emphasized the significance of a subscriber's 800 number being changed when it stated:

> "Thus, in addressing the prospective costs a customer would incur if it changed its 800 number, AT&T ignores what may be the most significant costs involved for some customers -- forfeiting the value of their old 800 numbers, including any value inherent in the number itself, as well as any other goodwill associated with the number." 6 FCC Rcd. No. 21, p.5904.

II.

AT&T'S MONOPOLY LEVERAGING OF ITS 900 TELEPHONE NUMBERS IS SIGNIFICANTLY MORE RESTRICTIVE THAN IT WAS FOR AT&T'S 800 NUMBERS; AND A 900 NUMBER IS MORE CRITICAL TO ITS SUBSCRIBER THAN AN 800 NUMBER BECAUSE THE 900 NUMBER IS TYPICALLY THE ONLY WAY FOR THE 900 SUBSCRIBER'S CUSTOMERS TO DO BUSINESS WITH, OR TO EVEN BE ABLE TO CONTACT, THE 900 SUBSCRIBER.

AT&T currently has in excess of 70% of the national 900 telephone market and engages in even more anticompetitive "tying" practices with its 900 numbers than AT&T did with reference to its 800 numbers.

A 900 number is even more critical to its subscriber than an 800 number because the 900 number is typically the only way for the 900 subscriber's customers to do business with, or to even be able to contact, the 900 subscriber.

AT&T will only provide 900 billing services if AT&T's 900 transport services are used for the same 900 number. AT&T's normal practice upon termination of AT&T's Billing Services Agreement ("BSA") by either party, upon thirty days notice, with or without AT&T's cause, is to also terminate the information provider's ("IP's") unique 900 number(s), as set forth in the last sentence of Section 9. of AT&T's BSA. Thus, when a BSA is terminated by either party, AT&T thereafter refuses to provide tariffed transport services to the IP on the same 900 numbers on which AT&T has terminated billing and collection services. At that point in time, AT&T will only provide tariffed transport services on different 900 numbers. Although AT&T's BSA provides that it will terminate the IP's 900 numbers upon "...termination of this Agreement", in fact AT&T terminates an IP's 900 numbers whenever it terminates billing services for those 900 numbers, even though the AT&T 900 BSA for all of the IP's 900 numbers was not terminated.

In short, AT&T will only continue to provide utility services (i.e., tariffed transport services) to the IP, upon termination of

the IP's BSA, if the IP gives up its very valuable asset, its unique 900 telephone numbers.

After a BSA is signed with AT&T by a 900 IP and the 900 IP has invested time and advertising in particular 900 numbers, the AT&T 900 IP cannot economically switch providers of its 900 billing services, without losing its unique 900 numbers, in which it has typically invested significant sums in advertising (which in some cases may amount to hundreds of thousands of dollars or more), and which will continue to generate revenue from such 900 numbers for years to come without any additional advertising. Therefore, AT&T is an essential service to its 900 IPs for its 900 numbers for which there is no substitute. In this respect, AT&T has a monopoly and restrains trade.

Unlike AT&T's monopoly leveraging with 800 numbers, which the FCC concluded violated Section 201(b) of the Communications Act, when AT&T terminates a subscriber's 900 number it does not permit the use of a referral number so the callers dialing the old 900 number would hear a recording informing them of the new 900 number. See, 6 FCC Rcd. No. 21, p.5904, note 218. This very dramatic difference between AT&T's practice of no referral service whatsoever on AT&T's terminated 900 numbers (compared to a referral service on AT&T's terminated 800 numbers) results in an almost total monopoly leveraging of AT&T's 900 billing services to the great detriment of other third party 900 billing companies, and to AT&T's 900 subscribers. This results in AT&T's 900 billing services, which have been detariffed by the FCC, being almost

totally immune to competition from third party 900 billing services!

III.

UNTIL 900 NUMBER PORTABILITY IS AVAILABLE, THE FCC SHOULD DECLARE:

(A) FUTURE BUNDLING BY AT&T OF ANY SERVICE WITH EXISTING 900 TELEPHONE NUMBERS AN UNLAWFUL PRACTICE UNDER SECTION 201 OF THE COMMUNICATIONS ACT;

(B) AT&T'S REFUSAL TO CONTINUE TO PROVIDE TARIFFED TRANSPORT SERVICES ON THE SAME 900 TELEPHONE NUMBERS AFTER TERMINATION BY EITHER PARTY OF BILLING SERVICES ON THOSE 900 NUMBERS VIOLATES THE COMMUNICATIONS ACT;

(C) SECTION 5.4.2.E. OF AT&T'S TARIFF NO. I. IS UNENFORCEABLE; AND

(D) THAT NOTWITHSTANDING ANYTHING TO THE CONTRARY IN AT&T'S 900 BILLING SERVICES AGREEMENT, AT&T IS PROHIBITED BY THE COMMUNICATIONS ACT AND BY SECTION 5.4.3.A. OF AT&T'S TARIFF NO. I FROM TERMINATING AN AT&T 900 SUBSCRIBER'S 900 NUMBER UPON TERMINATION BY EITHER PARTY OF AT&T'S BILLING SERVICES FOR THAT 900 NUMBER.

The comments of the various parties to the FCC's telephone number portability rulemaking proceeding demonstrate that for a variety of reasons 900 number portability will take a substantial time period to fully implement. During that time period, the monopoly leveraging anticompetitive practices by AT&T, which controls in excess of 70% of the national 900 market, and the resulting anticompetitive evils resulting therefrom should not be permitted to continue to exist.

Therefore, for all of the reasons set forth in my September 11, 1995 Comments on this matter, until 900 portability is available, the FCC should declare:

1. Future bundling by AT&T of any service with existing 900 telephone numbers an unlawful practice under Section 201 of

the Communications Act;

2. AT&T'S refusal to continue to provide tariffed transport services on the same 900 telephone numbers after termination by either party of billing services on those 900 numbers violates the Communications Act;

3. Section 5.4.2.E. of AT&T's Tariff No. I. (and the similar provision in AT&T's BSA) is unenforceable; and

4. That notwithstanding anything to the contrary in AT&T's 900 billing services agreement, AT&T is prohibited by the Communications Act and by Section 5.4.3.A. of AT&T's Tariff No. I from terminating an AT&T 900 subscriber's 900 number upon termination, by either party, of AT&T's billing services for that 900 number.

IV.

AS LONG AS AT&T'S BILLING SERVICES FOR AN IP'S 900 NUMBERS ARE TIED TO AT&T'S TARIFFED TRANSPORT SERVICES FOR THOSE 900 NUMBERS, AND UNTIL 900 PORTABILITY IS AVAILABLE, THE FCC SHOULD REQUIRE AT&T'S BILLING SERVICES TO BE TARIFFED BECAUSE THEY ARE SUBJECT TO THE ACT SINCE THEY ARE "IN CONNECTION WITH" AT&T's 900 COMMUNICATIONS SERVICES.

Section 201(b) of the Federal Communication Act applies not only to AT&T's 900 transport services to the IP (including the 900 numbers), but also to AT&T's services which are "for or in connection with" such common carrier's 900 "communication services." The remaining issue then, is whether under Section 201(b), AT&T's 900 billing services to the IP, which are "tied" to AT&T's tariffed transport services for the same 900 numbers, are "for or in connection with such communications (i.e., AT&T's 900 transport) services" to the IP.

AT&T only offers 900 billing services to customers for whom AT&T provides 900 transport services on the same 900 numbers. Therefore, since AT&T's billing services for 900 numbers are exclusively "tied" to AT&T's transport services for those same 900 numbers, [1]AT&T's billing services are "for or in connection with such communications (i.e., AT&T's 900 transport) services" pursuant to Section 201(b) of the Act.[2] Because of AT&T's "tying" of their tariffed 900 MultiQuest services to AT&T's 900 MultiQuest Billing Services, AT&T's 900 billing services cannot be considered to be merely "incidental", as they were in the FCC's Audio Communications decision.

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[1]Thus, all AT&T's 900 BSA customers must use AT&T's 900 transport services; then if the BSA is terminated by either party, for any reason whatsoever, AT&T's 900 customer loses its unique 900 numbers. The practical effects are obvious. After operations commence, the AT&T 900 IP cannot elect to use a competitive 900 billing service without losing its 900 numbers, in which it has invested significant monies in promotion, and which are typically the only practical way for the 900 IP's customers to do business with, or to even be able to contact, the IP. Therefore, under paragraph 8.G. of the AT&T's BSA, the 900 IP must use AT&T's 900 transport services. If an IP uses AT&T's 900 transport services, the IP must continue to use AT&T's 900 billing services or lose its unique 900 numbers. These are numbers in which the IP typically will have invested substantial sums. Thus, the effect of these provisions in AT&T's BSA are to "tie" AT&T's tariffed 900 transport services to AT&T's 900 billing services, and to prevent the IP from utilizing billing services of AT&T's competitors. AT&T's "tie-in" is so complete that AT&T contends that its 900 MultiQuest transport services and its 900 MultiQuest billing services, "constitute a single product". See page 23, lines 16-17 of Exhibit A to the Kahn Declaration accompanying David Kahn's September 11, 1995 Comments on Telephone Number Portability.

[2]If it is determined that AT&T's tied 900 billing services are required to be tariffed under the Federal Communications Act, and therefore must be provided to the IP, then AT&T's anticompetitive and illegal BSA provision providing for the termination of the IP's 900 numbers upon termination of AT&T's billing services is a fortiori unenforceable because AT&T's BSA cannot, and does not, overrule the Federal Communications Act.

Logically, the words "for or in connection with such communication services" in Section 201(b) of the Act must extend to non-tariffed services, such as AT&T's "tied" billing services for the same 900 telephone numbers; otherwise, they would be meaningless.

The Courts of Appeals that have reviewed the "in connection with" language with respect to Section 152(b)(1) of the Act have given that language its plain meaning and construed it broadly. Thus, under the principle of parallel construction, the prohibition against unjust and unreasonable "practices" etc. in Section 201(b) must similarly be construed to extend to [AT&T's] "tied" billing services, which are provided "in connection with [AT&T'] communications [i.e., 900 MultiQuest transport] services" under Section 201(b) of the Act. McDonnell Douglas Corp. v. General Tel. Co. Of Cal., 594 F.2d 720 (9th Cir. 1979), Cert. denied, 444 U.S. 839 (1979). See also People of the State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990) and National Ass'n of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989) which support the proposition that AT&T's "tied" 900 billing services are provided "in connection with communications services" pursuant to Section 201(b) of the Act.

It should be noted and emphasized that the D.C. and Ninth Circuits have held billing and similar services to be "in connection with" communication services without the inextricable AT&T "tie-in" present in AT&T's 900 MultiQuest billing services.

A. The FCC Dial-It and Audio Communications Decisions Were Based on the Fact that the 900 Carrier's Billing and Transport Services in Those Cases Were Not Inextricably Tied Together, As They Are in AT&T's 900 MultiQuest BSA.

The critical fact here is that the FCC's Dial-It holding, that AT&T's billing and collection services are not subject to tariff, was based on the factual foundation that AT&T's 900 billing services in that case were not tied to AT&T's 900 tariffed services for the same 900 telephone numbers, as they are in AT&T's 900 MultiQuest BSA. More specifically, once AT&T ceases billing and collection services for an IP's particular 900 MultiQuest number, AT&T refuses to thereafter provide transport services to the IP for that same 900 number.

In Dial-It, supra, the FCC stated in relevant part in paragraph 25 at 3432:

> "AT&T asserts that sponsor subscribers are not required to take Premium Billing as a concomitant to tariffed Dial-It 900 services and indeed, tariffed service subscribers are not 'entitled' to receive Premium Billing service. Instead, they are separate services."

In fact, AT&T currently contends before the U.S. District Court in Las Vegas (page 23, lines 16-17 of Exhibit A to the Kahn Declaration accompanying David Kahn's September 11, 1995 Comments) that AT&T's 900 MultiQuest billing services and AT&T's 900 MultiQuest tariffed transport services are not separate, but rather they "constitute a single product". (Emphasis added.)

Likewise, the FCC's Audio Communications decision was also based on the fact that when Sprint ceased providing billing services for a particular 900 number, they continued to provide transport services for that 900 number. Or as the FCC stated in par. 6 of its decision:

> "Sprint Telemedia continues to offer 900 transmission service on a common carrier basis, but without billing and collection for all interested IP's." (Emphasis added.)

In other words, Sprint did not tie its 900 billing services to its 900 transport services for a particular 900 number!

B. In this Case (Unlike the Dial-It and Audio Communications Cases) AT&T's 900 Billing Services Are Inextricably Tied to AT&T's 900 Transport Services for the Same 900 Numbers.

Because of AT&T's tying and exclusive dealing provisions, all AT&T's 900 BSA IP's must use AT&T's transport services; then if AT&T's BSA is terminated by either party, for any reason whatsoever, AT&T's 900 IP loses its unique 900 numbers.

If a IP uses AT&T's 900 MultiQuest transport services, the IP must continue to use AT&T 900 MultiQuest billing services or lose its unique 900 numbers; in which the IP typically will have invested substantial advertising sums. Thus, the effects of these provisions in the AT&T's BSA are to "tie" AT&T's tariffed 900 transport services to AT&T's 900 billing services for the same 900 number, and to prevent AT&T's IP's from utilizing billing services of AT&T's competitors. Once, again, AT&T's "Tie-in" is so complete that AT&T says that their 900 billing services and their 900 transport services "constitute a single product"!

C. If AT&T's 900 Billing and AT&T's 900 Transport Services "Constitute a Single Product", They Are Subject to Section 201(b) the Act, and Cannot be Terminated Pursuant to the BSA.

AT&T's "tying" provisions so inextricably connect AT&T's 900 tariffed transport services for the IP's particular 900 numbers and AT&T's billing services for those 900 numbers that AT&T alleges that its 900 MultiQuest transport and billing services "constitute a single product". See page 23, lines 16-17 of Exhibit A of the Kahn Declaration accompanying David Kahn's September 11, 1995 Comments.

If AT&T's 900 billing and transport services "constitute a single product", then clearly they are subject to the provisions of Sections 201(a) and (b) and 202(a) of the Act, and must be provided to all IP's pursuant to the Federal Communications Act on "just and reasonable" terms. In such a case, AT&T's 900 MultiQuest billing services are more than "in connection with" AT&T's tariffed 900 MultiQuest "communication services "; since they "constitute a single product", AT&T's 900 billing services are part of AT&T's tariffed "communications services" under Section 201(b).

Therefore, until 900 portability is available, the FCC should require AT&T's 900 "tied" billing services to be tariffed so that AT&T cannot continue to terminate 900 MultiQuest billing services pursuant to AT&T's BSA, which, in turn, supposedly enables AT&T to terminate the IP's unique 900 numbers at the same time.

D. The Purpose of the Federal Communications Act Is Being Emasculated Because AT&T's 900 MultiQuest Billing Services Are Not Currently Tariffed, Even Though AT&T's 900 Billing Services Are Inextricably "Tied" to AT&T's 900 Transport Services for the Same 900 Numbers.

It is a basic tenet of statutory construction that in interpreting the meaning of the words of a statute, the purpose of the statute is of critical importance (i.e., what "evils " is the statute directed to). The purpose of Section 201(b) of the Federal Communication Act is to protect subscribers from the unrestricted power of a common carrier, by requiring the common carrier's services to be provided to all subscribers on a "just and reasonable" basis.

Therefore, the words "for or in connection with such communication services" in Section 201(b) of the Act, should be

interpreted to include AT&T's 900 MultiQuest billing services, which are tied to AT&T's tariffed transport services for the same 900 numbers. This is necessary in order to prevent the evil that is present in AT&T's 900 MultiQuest BSA. Namely, AT&T's exclusive dealing and "tying" provisions in its BSA, which provide that once AT&T ceases billing services for a particular 900 number, AT&T refuses to thereafter provide tariffed transport services to the IP for that 900 number; even though the 900 number is part of those tariffed transport services.

In other words, AT&T is using the leverage of its tariffed transport services to the IP (i.e., the IP's 900 numbers which are part of such tariffed services) to exact a confiscatory penalty on the IP (i.e., the loss of the IP's 900 numbers), if the IP chooses a competitor of AT&T to do the IP's 900 billing services.

Indeed, one of the critical elements of the FCC's Audio Communications decision was that:

> "the provision of such services is subject to competition or the likelihood of competition." Id. at paragraph 33.

This rationale is especially applicable to AT&T's 900 MultiQuest BSA (unlike the situations in the FCC's Dial-It and Audio Communication decisions), because AT&T's billing services for each IP's 900 number are tied to AT&T's transport services for that 900 number. This precludes the IP from going to a competitive 900 billing company, unless the IP is willing to lose its most valuable asset, its unique 900 numbers.

The FCC in these decisions reasoned that where the interexchange carrier acts merely as a conduit for the billing of a non-carrier third party, it is not a common carrier communication

service subject to the provisions of Title II. These FCC decisions, however, are especially inapposite AT&T's 900 BSA, where (i) AT&T's 900 billing services are expressly tied (in AT&T's 900 MultiQuest BSA) to AT&T's tariffed transport services for the same 900 numbers (i.e., because of the "tie-in" under the FCC's rationale they become a "communication service"), and (ii) AT&T contends that they "constitute a single product" (i.e., AT&T's 900 MultiQuest billing services are part of AT&T's 900 transport services).

Since the purpose of the Federal Communications Act is to protect subscribers, such as the IP, from unreasonable or unjust practices by a common carrier (such as AT&T's "tie-in" of their 900 MultiQuest billing services to their 900 transport services for the same 900 number) the words "for or in connection with such communication services" in Section 201(b) should include AT&T's 900 MultiQuest billing services, where AT&T (with 70% of the national 900 market) "ties" them together; especially when that common carrier contends that their inextricably "tied" 900 billing and 900 transport services "constitute a single product". To do otherwise would be to eviscerate the protections of the Communication Act. Thus, pursuant to the reasoning of the Court of Appeals for the Ninth Circuit in California, the FCC should not rely on the distinction between common carrier and non-common carrier service; where the common carrier's billing services are tied to its transport services as in AT&T's 900 MultiQuest BSA. See California, supra, 905 F.2d at 1242.

Thus, because of AT&T's 900 MultiQuest tying and exclusive

dealing provisions, AT&T's 900 billing services are provided "in connection with communications services". Therefore, it is respectfully submitted that the decision of the Ninth Circuit in California is applicable to AT&T's 900 MultiQuest billing services because they are "tied" to AT&T's 900 transport services; and the FCC's Dial-It and Audio Communications decisions (which are based upon the critical fact that the 900 billing services in those cases were not tied to the transport services for the same 900 numbers) are not applicable.

V.

CONCLUSION.

Therefore, as long as 900 telephone numbers are not portable, the AT&T IP (which constitutes 70% of the national 900 market)remains totally dependent upon AT&T for the provision of transport services for its unique 900 telephone numbers because of AT&T's illegal "tie-in" provisions. AT&T's termination of the IP's unique 900 telephone numbers upon termination on thirty days notice of AT&T's billing services, by either party, for any reason whatsoever significantly and adversely affects the IP's entire significant past investment in advertising over many years in the past to generate demand for the IP's particular telephone numbers, and deprives the IP of very substantial revenues from the residual response to such advertising for many years in the future.

Because of (i) the very severe consequences of such anticompetitive illegal practices by AT&T during the time period it takes to implement 900 portability, (ii) the overwhelming economic power of AT&T and their dominate 70% share of the national 900

market, (iii) the ability of AT&T to destroy an IP or service bureau's entire business in thirty days by terminating 900 billing services without cause, and at the same time terminating all of the IP's and/or service bureau's 900 numbers, gives AT&T a strangle-hold on an IP's and/or service bureau's business to discourage them from instituting any litigation with AT&T, and (iv) the cost and expense of litigating with AT&T, until 900 portability is available, the FCC should declare:

1. Future bundling by AT&T of any service with existing 900 telephone numbers an unlawful practice under Section 201 of the Communications Act;

2. AT&T'S refusal to continue to provide tariffed transport services on the same 900 telephone numbers after termination by either party of billing services on those 900 numbers violates the Communications Act;

3. Section 5.4.2.E. of AT&T's Tariff No. I. is unenforceable; and

4. That notwithstanding anything to the contrary in AT&T's 900 billing services agreement, AT&T is prohibited by the Communications Act and by section 5.4.3.A. of AT&T's Tariff No. I from terminating an AT&T 900 subscriber's 900 number upon termination, by either party, of AT&T's 900 billing services for that 900 number.

Dated: October 11, 1995

Respectfully submitted,

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